

Drafting Enforceable Ordinances

**Texas City Attorneys Association
Riley Fletcher Basic Municipal Law Seminar
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Overview

- 1. Draft ordinances with affirmative defenses, not exceptions**
- 2. Clearly label affirmative defenses, defenses, and exceptions**
- 3. Draft ordinances to provide separate subsections for the offense, affirmative defenses, defenses, and exceptions**
- 4. Dispense with culpable mental states**
- 5. Avoid cross references and references to specific state law provisions**

1. Draft affirmative defenses, not exceptions

- **Affirmative defenses, defenses, and exceptions all establish circumstances when ordinance does not apply.**
- **Prosecution must prove all elements of offense *beyond a reasonable doubt*, which includes negating exceptions.**
Tex. Penal Code (PC) 2.01, 2.02(b), 1.07(a)(22).
- **Prosecution not required to negate affirmative defenses and defenses. PC 2.03(b), 2.04(b).**
- **Affirmative Defenses are preferable because defendant must prove all requirements by preponderance of evidence.**
PC 2.04(d).

Complaints and Trial in Municipal Court

- **Complaints describe unlawful conduct and charge defendant with offense. Tex. Code of Crim. Proc. art. 45.018(a).**
- **Complaints must list all elements of offense.**
Villarreal v. State, 729 S.W.2d 348, 349 (Tex. App.—El Paso 1987);
PC 1.07(a)(22).
- **Because exceptions are elements of offense, drafting exceptions into ordinance can make trial complaint very lengthy, complicated, and difficult to prove.**

2. Clearly label affirmative defenses, defenses, and exceptions

- **Do use following clear, legal wording from PC 2.02-2.04:**
 - **It is an affirmative defense to prosecution ...**
 - **It is a defense to prosecution ...**
 - **It is an exception to the application of ...**

2. Clearly label affirmative defenses, defenses, and exceptions [cont'd]

- Do not use the following wording to signify an affirmative defense, defense, or exception:
 - Unless ...
 - Except as provided by ...
 - This section does not apply to ...

3. Separate subsections for offense, affirmative defenses, defenses, and exceptions

EXAMPLE

ARLINGTON ANIMALS CHAPTER

Section 4.10 Riding, Driving or Herding of Certain Animals

- A. A person commits an offense if he rides, herds or drives any horse, cow, sheep, goat, pig or llama:**
- 1. On a public sidewalk; or**
 - 2. On any private or public property without the effective consent of the owner of such property.**
- B. It is an affirmative defense to prosecution under this section that the person was a peace officer or animal services officer in the performance of his official duties; or the person was assisting a peace officer or animal services officer in the performance of his official duties.**

4. Dispense with Culpable Mental States

- **Culpable mental states (CMS):**

1. intentional,
2. knowing,
3. reckless,
4. criminal negligence.

PC 6.02-6.03.

General CMS requirement and key exception to the rule

- **General Rule**: CMS required for offense, even if law does not mention CMS, unless law explicitly dispenses with CMS. PC 6.02(a), (b), (c).
- **Exception**: many city ordinance violations may be strict liability offenses even if law is silent as to CMS. Multi-prong test to determine if ordinance-based offense is actually strict liability.
Aguirre v. State, 22 S.W.3d 463, 472-476 (Tex. Crim. App. 1999).

Fine ranges and culpable mental states

- **General fine range for city ordinance violation is \$1-\$500; however, fine range for city ordinance governing fire safety, zoning, or public health and sanitation is \$1-\$2,000 and for dumping of refuse is \$1-\$4,000. Tex. Loc. Gov't Code 54.001(b)**
- **City ordinance offense may not dispense with CMS if offense is punishable by fine exceeding \$500. PC 6.02(f), 12.23**
- **If CMS not alleged and proven at trial, penalty limited to \$500, regardless of ordinance penalty provision.
O'Reilly v. State, 501 S.W.3d 722, 728-30 (Tex. App.—Dallas 2016)**

Penalty Provisions

- **Option 1**

- **Penalty for all offenses is \$1-\$500. No CMS required.**

- **Option 2**

- **For offenses related to fire safety, zoning, or public health and sanitation, penalty is \$1-\$2,000. For offenses related to dumping of refuse, penalty is \$1-\$4,000. CMS required.**
- **For all other offenses, penalty is \$1-\$500. No CMS required.**

Penalty Provisions [cont'd]

- **Option 3**
 - **If offense does not include CMS, one is not required and penalty is \$1-\$500.**
 - **Although not required, if CMS is alleged in charge and:**
 - **Offense relates to fire safety, zoning, or public health and sanitation, penalty is \$1-\$2,000.**
 - **Offense relates to dumping of refuse, penalty is \$1-\$4,000.**

See Roark & Hardee L.P. v. City of Austin, 394 F.Supp.2d 911, 920 (W.D. Tex. 2005); *aff'd in part, rev'd in part, vacated in part* by 522 F.3d 533, 538, 556 (5th Cir. 2008)

5. Avoid cross references and references to specific state law provisions

- **REASON:** City Council or State Legislature may reorganize, renumber, or amend the referenced provisions.
- **RESULT:** references and cross-references become out of date and confusing.

State laws governing ordinances

- **LGC chapter 51: General Powers of Cities**
- **LGC chapter 52: Adoption and Publication**
- **LGC chapter 53: Codification**
- **LGC chapter 54: Enforcement**

*LGC = Tex. Local Gov't Code

Questions?

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